IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 16TH OCTOBER 2007 / 24TH ASWINA 1929

AS.No. 413 of 2002(E)

OS.439/1996 of PRINCIPAL SUB COURT,ERNAKULAM
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APPELLANT: DEFENDANTS 1 & 2
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1. STATE OF KERALA, REPD.BY THE
SECRETARY, IRRIGATION DEPARTMENT,
GOVT.SECRETARIAT, TRIVANDRUM.

2. THE SUPERINTENDING ENGINEER,
PWD PROJECT CIRCLE MUVATTUPUZHA, PRESENTLY
PROJECT CIRCLE, PIRAVOM, ERNAKULAM DISTRICT.

BY GOVERNMENT PLEADER SRI V.T.K. MOHANAN

RESPONDENTS: PLAINTIFF/DEFENDANT NO.3
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1. M.V.GEORGE, MUREEKAL HOUSE,
THALAKODE P.O., MULANTHURUTHY, ERNAKULAM DIST.

2. THE FEDERAL BANK LTD.,
TRIPUNITHURA BRANCH REPTD. BY ITS MANAGER,
TRIPUNITHURA P.O., ERNAKULAM.

BY ADV. SRI.SHOBY K.FRANCIS
SRI.VARGHESE C.KURIAKOSE
SRI.JACOB SEBASTIAN
SRI.PRAVEEN K. JOY
SRI.K.BABU THOMAS

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 16/10/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.890/03 IN A.S.NO.413/02

Dismissed

P.R.RAMAN, JUDGE.

16/10/2007 Sd/- V.K.MOHANAN, JUDGE.

True Copy

P.S. to Judge.

P.R. RAMAN & V. K. MOHANAN, JJ.

A.S. NO. 413 OF 2002

DATED THIS, THE 16TH DAY OF OCTOBER, 2007.

J U D G M E N T

Raman, J.

This is an appeal filed by the State. The appellants are defendants 1 and 2 in O.S. 439/1996 on the file of the Sub Court, Ernakulam.

2. The respondent/plaintiff instituted the suit for recovery of money due under a contract. The plaintiff, who was a Civil Work Contractor, undertook the "PVIP constructing Thonnallur minor distributory from Ch. 530 M to 1300 M including C.D. Works" by executing agreement dated 31.7.1984, after furnishing security deposit of Rs.22,500/-. As per the agreement, the period of 12 months for completion of the work has to be reckoned from the date of handing over the site. According to the plaintiff, the work site was handed over only on 7.8.1984 and the stipulated period expired on 6.8.1985. On field level measurements the quantity of excavation was increased from 18380 m^3 to 24526 m^3 and the work of blasting rock decreased from 5920 m^3 to 2454 m^3. The initial field level measurements of earth work excavation were approved by the second

defendant on 24.1.1985 and the plaintiff commenced the work on 25.1.1985 and completed 50% of the excavation work within four months. Initial level measurements of rock were approved only on 15.2.1990. There were objections from the adjacent land owners and the defendants required the plaintiff not to do the work in certain portions of the alignment. No protection was afforded and hence the plaintiff could not commence blasting work in cut and cover portion in which excavation was completed. Instead of estimated 14700 m^3, the plaintiff conveyed 25056m^3 of excavated materials. After the expiry of the original period of contract on 6.8.1985 the quoted rates became inoperative. The period was extended to 30.6.1990 at the instance of the defendants promising to make part payment of the bill promptly. But payment was not done as promised and the plaintiff had to borrow money from outside by paying huge amount of interest. Additional or altered structures were approved on 15.2.1990 which was never communicated to the plaintiff and hence additional work could not be taken up by him. After dragging the execution of the work for several years and disregarding their own breaches, the defendants seized all opportunities to project the plaintiff as the defaulter and terminated the contract at the risk and cost of the plaintiff on 3.4.1992. The plaintiff was

required to accept the ex parte measurements recorded by the defendants arbitrarily. Supplemental agreements executed were unenforceable in law as they were vitiated by factors such as undue influence, coercion and duress. The rate originally quoted were as per 1982 schedule which was subsequently revised several times. According to the plaintiff, Rs. 1,39,994/- is the amount due and payable at the revised rate for the work done. Various other amounts were also claimed such as value of 5000 m^3 of earth work excavation alleged to have been omitted to account, which will come to of Rs. 1,08,985/-, Rs. 1,70,554/- for the conveyance of 15056 m^3 and Rs. 8428/- for blasting 118 m^3 boulders which were not accounted by the defendants and Rs. 7,000/- for the work of de-silting etc. According to the plaintiff, he is entitled to get Rs. 1,12,142/- as compensation for the loss of profit on the balance work left, for maintaining men and machinery beyond 6.8.1985, he is entitled for a compensation of Rs. 52,000/- and an amount of Rs. 3,487/- which was wrongfully recovered from him under the pretext of value of rubbles. Further, for idling men and machinery, he is entitled to recover Rs. 28,000/ as compensation and interest of Rs.7,77,854/- on the delayed payment at the rate of 21% per annum. Besides these amounts, according to the plaintiff, he is entitled to

recover retention amount of Rs. 54,143/- and security deposit of Rs. 22,500/-. Thus, the plaintiff prayed for a decree for recovery of a total amount of Rs. 14,87,088/- with future interest at the rate of 21% per annum.

3. The defendants contended that the extension of time granted was at the request of the plaintiff, that they have taken timely action and provided all facilities to complete the work within the stipulated time, that the site was handed over possession on 7.8.1984, initial levels were taken on 28.8.1984, check levels were taken on 31.8.1984 and the quantity calculations were approved on 24.1.1985. They further contended that the quantity approved is 24526 m^3 , that initial levels of rock were taken on 28.8.1986, check levels were taken on 11.9.1986 and necessary instructions for blasting work were given on 21.4.1987. According to them, there was no delay in approval of the initial field level measurements of earth work excavation and also blasting of rocks. The first part bill was paid in March, 1985, second part bill in December, 1985 and the third bill was paid in November, 1987. The initial level measurement of rock was approved on 15.3.1990. The plaintiff informed the defendants that the objection of the local people were resolved amicably. According to them, the claim that the plaintiff had conveyed 25055m^3 of excavated materials is

baseless, that after September, 1996 the plaintiff did not turn up to resume the work in spite of registered notice, that the contract was terminated at his risk and cost, that a total sum of Rs. 4,31,224/- was paid as per the three part bills, that in spite of repeated requests, the plaintiff did not attend the site for taking final measurements or turn up to accept the measurements, that the additional works were approved on 15.3.1990 and information was conveyed to the plaintiff which is bound to do as per the terms of the agreement. According to the defendants, the cancellation of agreement was justified since the plaintiff did not do the work in spite of the supplemental agreement executed by him and hence the plaintiff is liable for damages suffered by them.

4. . The evidence in the case consists of the oral testimony of PWs.1 and 2 and Exts.A1 to A52 on the side of the plaintiff and DW1 and Exts.B1 to B14 on the side of the defendants. Ext.C1 was also marked.

5. The questions as to whether the appellants/defendants 1 & 2 committed any breach of contract and whether the respondent/plaintiff took any earnest steps to complete the work were considered by the court below as Issue Nos. 1 and 2 in para 7 of its judgment. After analysing the evidence on record, it was found that as per the admission made in the

written statement by appellants/defendants, initial level measurement of excavation of item No.1 of the schedule of works in Ext.B1 were approved by the second defendant only on 24.1.1985 and thus, there was a waste of more than five months out of the 12 months period, for which the respondent/ plaintiff is not responsible. According to the respondent/plaintiff he started the work on 25.1.1985 and 50% of the work was completed within four months. Exts.B2(a) and B2(b) are the part bills submitted by the respondent towards the work done which supports his case. The approval of initial level measurement for rock blasting, which is item No. 2 to Ext.B1 was further delayed. Admittedly, there was some objection from the public in blasting the rock as a result of which the work could not be done. But it cannot be said that it is due to the delay of level measurement of rock that the respondent/ plaintiff was prevented from doing the blasting work especially when he himself has averred in the plaint that there were objections from the public and he was accusing the defendants for not being given protection to commence the work. Thus, the delay in level measurement of the rock has not resulted in any consequence. According to the respondent/plaintiff, there is five months' delay in the matter of initial level measurement excavation of item No.1. Admittedly,

three part payments were made by the appellants/defendants and what remained to be paid was the 4th part payment bill, which was submitted by the respondent/ plaintiff on 28.9.1986. The court below proceeded to hold that since there was delay in effecting part payment and with-holding the amount due to the respondent/plaintiff under the contract, there is justification on his part to do so, since payment of part bill is also as per the conditions of the contract, without which the progress could not be achieved. On an overall consideration of the materials available on record, the court below found Issue Nos. 1 and 2 in favour of the respondent/ plaintiff.

6. Though the learned Government Pleader, appearing on behalf of the State would assail the finding of the court below, we do not find any acceptable ground to upset the said finding. The finding as recorded by the court below, based on reasons given, does not suffer from any illegality nor can it be said to be a perverse finding calling for interference by the appellate court. The said finding is confirmed.

7. The next question that was taken up for consideration by the court below was regarding the validity of the supplementary agreement executed by the parties. In Para 12, the court below found that the supplementary

agreement is void ab initio since they were vitiated by undue influence and coercion since the part payment of the bill was pending payment and the financial weakness of the of the plaintiff was exploited for compelling him to execute the supplementary agreement and therefore, such supplementary agreement has no force in law. The said finding is seriously attacked by the learned Government Pleader appearing for the State. Learned counsel for the respondent/plaintiff, on the other hand, would support the said finding. There is no dispute that if supplementary agreements were made to be executed under compulsion, including taking advantage of the economic position of the respondent, such contract will be vitiated. But whether in fact, there was such vitiating factors is a matter for consideration based on the evidence on record.

8. Admittedly, part payment bills were pending. It was found that the appellants/defendants were purposefully with-holding the dues to the respondent/plaintiff and executed the supplementary agreement incorporating terms suitable to them. Exts.B1(a) to B1(d) are the supplementary agreements executed between the parties. Exts.B1(b) and B1 (c) are seen signed on 31.3.1987 and 5.11.1987 respectively, and part of amounts covered by Exts.B2(a) and B2(c) and the whole amount covered

by Ext.B2(d) were with-held by the appellants from 23.9.1986. Further, Ext.B1(d) supplementary agreement was executed on 5.11.987 and part of the amount covered by Ext.B2(d) was paid on 7.11.1987. The proximity of the dates of request for extension of time, order of extension, signing of supplementary agreements and payment on part bills etc. were taken into consideration by the court below to accept the case of the respondent/plaintiff that there was coercion and undue influence for requesting extension of time and to sign the supplementary agreements. In this connection, reference is made to Exts. A5, A19, A20 and A23 by which the respondent/plaintiff expressed his unwillingness to proceed with the work at a loss and even requested to close the agreement Ext.B1. Therefore, the conduct of the respondent/plaintiff in requesting for time for completion of work was held to be contrary to his own earlier letters. That is a factor which necessarily has to be taken note of in considering as to whether the part-payment bill pending payment by the Department had influenced the request for further time for completion of the work and the validity of the supplementary agreement. The court below has rightly referred to these material piece of evidence in the case to hold that these supplementary agreements were vitiated because of undue influence,

coercion etc. This issue was thus answered in favour of the respondent/plaintiff and we do not find any acceptable reason to take a different view.

9. The next question that was taken up for consideration is as to whether the plaintiff is entitled for payment at the prevalent rate from time to time for the work carried out beyond 6.8.1985 and was there any agreement for the costs incurred in belated construction. Issue Nos. 3 and 8 are considered by the court below in para 14 of its judgment. As per the agreement condition and reckoning the twelve months period from the date of handing over the site, the said period will expire on 6.8.1985. But the original date of agreement is 31.7.1984. So the period will expire on 30.7.1985. Even though the delay for leveling might be five months beyond 6.8.1985, but works were carried out by the plaintiff up to 28.6.1986. Therefore, during the one year period, the period from 6.8.1985 up to 28.6.1986, plaintiff cannot be compelled to undertake the work at the same rate, provided there was any revision in the rate. Admittedly, revision had been effected in the PWD rate and the court having found, which we have approved, that the delay is attributable on the part of the appellants/defendants for any work done beyond the 12 months' period, the

plaintiff will be entitled for payment at the prevalent rate. The obligation of the respondent/plaintiff to carry out the work beyond 6.8.1985 is subject to his right for due payment in terms of costs incurred as stipulated in Sections 51, 53, 54 and 55 read with Section 73 of the Contract Act. Various authorities have settled this position. The decisions support the case of the plaintiff in this regard. Therefore, for the work done beyond the period of the original contract, a just increase in the rate over the stipulated rate is liable to be made and paid to the plaintiff. The case of the respondent/plaintiff was that Ext.B1 rate was increased by 200 % or more by the subsequent revision of schedule of rates. The very fact that the appellants had re-tendered the work by giving 352% increase over ExtB1 rates would clearly show that there was an average increase of 50% in Ext.A51(a) schedule over Ext.B1 as admitted by DW.1. What is claimed by the respondent/plaintiff by way of increase is 30% for the actual quantity of work executed by him after 6.8.1985 and the court below awarded an increase at the rate of 30% over and above Ext.B1 rate. We do not find any reason to interfere with this finding as well.

10. The next question to be considered is as to whether the plaintiff is entitled to get conveyance charges for 15056m^3 of excavated soil.

Paragraph 17 of the judgment of the court below deals with the above issue. Item No. 8 of Ext.B13 stipulates conveyance of 14700 m^3 excavated materials. This estimation was made on an assumption that excavated materials to be conveyed would be 5000 m^3 and the same could be dumped besides the canal alignment in the acquired land. But the respondent/plaintiff could not dump so much quantity; but only 920 m^3 in the acquired land. So the balance quantity which he could not dump had to be conveyed, the total quantity of which comes to 25056m^3. But the appellants have paid for 10,000m^3 only. Though the appellants had disputed the quantum of excavated materials and stated that the respondent is entitled only for an excavation of 3000m^3 only, referring to Ext.C1 commission report, the court below found that the respondent is entitled to be paid for conveyance of 4313m^3 excavated materials. When there is a dispute between the parties regarding the actual quantum thus conveyed, as the respondent could not dump it in the acquired land, the only means by which it could be ascertained is by way of a commission duly appointed. Such a report of the commissioner having been placed and no possible objection could be taken thereof, we do not find any illegality in accepting the commission report and the assessment of quantity based thereon.

However, the argument of the respondent/plaintiff based on the admitted quantum of total excavation and addition thereon, the quantity involved due to change of PLS etc. was not accepted by the court below in the absence of any evidence on record. Therefore, accepting Ext.C1 report and by giving 20% bulkage, the balance quantum was calculated as 5176m^3. Deducting the amount already paid, the balance amount due to the respondent for conveying excavated materials was worked out as Rs. 58,644/-. The conclusion so reached by the court below, on acceptable evidence, do not call for any interference by this court.

11. There cannot be any dispute that the respondent/plaintiff is entitled for refund of security amount and other amounts. It was found in para 20 that for the earth work excavation the respondent is entitled for payment with respect to a total unpaid quantum of 21054 m3.(454m^3 + 2600m^3), which would come to Rs.1,55,957/-. Respondent claimed only Rs.1,08,985/- being the balance cost of work which according to him, left unaccounted by the appellants. Thus, the court below has only allowed an amount of Rs. 1,08,985/- on this count. Equally an amount of Rs. 8,428/- was also awarded by the court below, being the value of blasting work done by the respondent, which was left unaccounted by the appellants.

Another amount of Rs. 3,487/-which was illegally recovered by the appellants from the respondent, alleging that he has used blasted rock in the course of the work, was also ordered to be paid to the respondent. Besides the retention amount of Rs. 54,143/- and security deposit of Rs. 22,500/-. These amounts were with-held only because of the cancellation of the agreement between the respondent/plaintiff and the appellants. Thus, the answer given to issue Nos. 5 and 6 and the quantification of the amount arising thereon in para 20 does not call for any interference.

12. An amount of Rs. 1,12,143/- in lieu of gains deprived at 10% of the value of works was claimed by the respondent. But admittedly, he had completed more than 50% of the work and part bills were also raised by him and paid. The court below has also granted 30% increase over Ext.B1 rate for the work actually done by the respondent beyond 6.8.1985 up to 28.6.1986. Admittedly, the plaintiff has not done any work during the period of supplementary agreement. On the other hand, the plaintiff was only requesting to cancel the agreement and to relieve him from the obligation of completing the remaining work. When it is found that supplementary agreements are void ab initio and when admittedly, the respondent/ plaintiff had not completed the work in spite of such extended

period, we do not think it is justifiable on the part of the respondent to claim a percentage by way of gains said to have been prevented by the appellants. The respondent had been given opportunity to complete the work by extending the period within which even he could have been completed the work and claim the amount. This having been not done, we do not find it is proper to grant him any relief under relief (iii)f as compensation for prevented gains.

13. As regards the claim under Relief (iii)g, what has been actually granted is only the establishment cost for idling the staff for 13 months after 6.8.1985. Even though an amount of Rs.52,000/- is claimed under Relief (iii)g, and an amount of Rs.28,000/- under relief (iii)(i), the court below has only allowed an amount of Rs. 20,000/- towards additional establishment costs. The amount as awarded does not appear to be excessive and we do not think any interference is called for in this appeal.

14. Under Relief No. (iii)(k) a sum of Rs.7,77,854/- was claimed in lieu of interest paid by the respondent/plaintiff to the third defendant Bank (second respondent herein). The Bank calculated interest at the rate of 21% per annum. The court below found that a party to an agreement can claim interest which is not prohibited by agreement. Reliance was also placed

on the decision reported in (1999) 4 SCC 327 and 1999 (3) KLT (1). The court below, after considering the entirety of the matter, allowed 12% interest by way of compensation on the amount due and payable to the plaintiff on the date of termination of the contract. The amount thus worked out is Rs.81,852/-. It is stated that subsequently, an arithmetic error crept in in the figure and it was shown as 1,27,797/- which was accordingly, corrected. The corrected decree was not however taken into consideration for the purpose of valuing the appeal herein. The compensation awarded in the factual situation, when admitted amounts were payable to the plaintiff, cannot be said to be illegal. No interference is called for.

15. What remains to be considered is the interest awarded on the sum adjudged by the court below as payable to the respondent/plaintiff. As against the claim of 21% per annum, 18% per auum from the date of suit till realization is awarded. In this connection, it has to be noticed that the awarding of interest is a matter of discretion by the court, since this item of interest is not provided for in the contract. Admittedly, both sides were alleging delay on the opposite side and while the State terminated the contract, the respondent would contend that the termination was illegal. Admittedly, supplemental agreements were executed by the respondent.

Even though the appellant would contend that he paid interest to the Bank, details as to what is the actual rate of interest and whether he has actually availed any loan, are matter on which no proof evidence is available. In the circumstances, we reduce the rate of interest to 12% in the place of 18% from the date of suit till the date of decree and thereafter, at 9% till realisation.

The appeal is thus allowed partly modifying the decree and judgment passed by the court below to the above extent. The parties shall bear their respective costs.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-

P.R. RAMAN &
V.K. MOHANAN, JJ.
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A.S. NO. 413/2002

J U D G M E N T

16TH OCTOBER, 2007.